

Kansas Department of Health and Environment
Regulatory Impact Statement

Pursuant to K.S.A. 2016 Supp. 65-34, 161- 65-34, 174

Proposed Amended Regulations K.A.R. 28-71-1 – K.A.R. 28-71-12

April 7, 2017

Executive Summary of Proposed Regulations

K.S.A. 65-34,163 authorizes the Secretary of the Kansas Department of Health and Environment (KDHE) to make rules and regulations (K.A.R. 28-71-1 through 28-71-12) for the Voluntary Cleanup and Property Redevelopment Program (VCPRP). The VCPRP allows owners, developers, prospective purchasers, and other eligible parties to voluntarily address environmental issues associated with contaminated properties. KDHE met with stakeholders to identify and discuss concerns with the implementation of the program. This was done with the overall goal of improving efficiency in moving sites toward closure while remaining protective of human health and the environment. House Bill 2193 amended current law in 2015 regarding the Voluntary Cleanup and Property Redevelopment Act administered by the Bureau of Environmental Remediation (BER). The amended statutes addressed the following goals: 1) Allow an innocent property owner to receive a No Further Action (NFA) determination regardless of whether the responsible party is enrolled in a state cleanup program; 2) Provide KDHE with the flexibility to issue NFA determinations based on risk analysis for low-risk sites even in instances when the contamination may exceed the regulatory standards; and 3) Remove the requirement that BER determine which environmental consulting companies are qualified to work for private industries as part of the VCPRP.

The purpose of these proposed regulatory changes was to address statute revisions. In doing so, KDHE addressed other issues in the regulations noted by stakeholders and staff to streamline processes within the program. Additional revisions were made throughout the regulations to remove self-regulating language, remove duplicative language that is found in statute, substitute “secretary” for “department” where actions require discretion, and address grammatical changes or points of clarification.

Summary of Substantive Changes

K.A.R. 28-71-1. Definitions. Amendments include the addition and/or revision of the following terms: “class one contamination,” “class two contamination,” “environmental site assessment,” “environmental use control,” “maximum contaminant level,” and “risk management plan.” Terms removed from regulation include “adjacent property,” “class three contamination,” “class four contamination,” and “qualified environmental professional.” “Department” was removed and replaced by “secretary” where actions require discretion throughout the regulations.

K.A.R. 28-71-2. Applicant. This regulation describes the applicant’s relationship to the property “described in the application.” “Described in the application” was added for clarification. Minor grammatical revisions were made to improve the text.

K.A.R. 28-71-3. Eligibility determination. This regulation outlines the eligibility determination for property described in the application. An amendment clarifies that properties are required to

meet the criteria defined in K.S.A. 65-34,161 et seq. “Department” was changed to “secretary” where actions require discretion. Minor grammatical revisions were made to improve text.

K.A.R. 28-71-4. Application process. This regulation provides the requirements for a complete application, specifies who makes the determination of eligibility, and details the reapplication process. Revisions and deletions were made to the text to better define the application and reapplication process. In addition, the process will now be detailed in program guidance. “Department” was removed and replaced by “secretary” where actions require discretion. Self-regulating language within the regulation was removed.

K.A.R. 28-71-5. Classification determination. This regulation clarifies supporting information needed to justify contaminant class. The contamination classes were consolidated from four classifications to two. Self-regulating language was removed and/or revised. In addition, an amendment provides that additional documentation can be submitted to the department to support a reclassification of the property.

K.A.R. 28-71-6. Voluntary agreement. This regulation originally required the deposit amount of \$2,000 for Class I contamination and the deposit amount of \$5,000 for Class II contamination. An amendment increases the initial deposit from \$1,000 to \$2,000 for a Class I subject property to cover all direct and indirect costs of the department including oversight and project review. The Class II maximum initial deposit remains \$5,000. Historically, the initial deposit often failed to cover costs associated with site investigation and cleanup to meet closure requirements within the timeframe requested for redevelopment properties. The increased deposit will assist KDHE with meeting the needs of the voluntary party expeditiously for Class I redevelopment sites without additional invoicing. Any remaining funds from the deposit will be returned to the voluntary party at project conclusion or mutual agreement on termination. Minor grammatical revisions were made to improve the text. “Department” was removed and replaced by “secretary” where actions require discretion.

K.A.R. 28-71-7. Initial deposit and reimbursement. The proposed amendments detail the invoicing process to include quarterly invoices. The deposit made by the voluntary party will be used to cover all direct and indirect costs until the deposit is reduced to \$1,000 for Class I subject property and \$2,000 for Class II subject property. KDHE will move directly to quarterly invoicing once the deposit is reduced to the minimum amount. Language was altered regarding oversight by contractors rather than consultants. KDHE removed language that identified administrative decision making by the department as oversight.

K.A.R. 28-71-8. Environmental site assessments. This regulation defines the qualifications of the preparer and provides a list of necessary elements to be included in the environmental site assessment. An amendment states “the site assessment shall be prepared by an individual who possesses the education, experience, or licensure sufficient to prepare a competent environmental site assessment.” The requirement that KDHE accept/approve qualified environmental professionals was removed from the regulation.

K.A.R. 28-71-9. Voluntary cleanup work plans and reports. This regulation describes the objectives to be met for work plans and reports for investigation and remediation for the VCPRP. Amendments allow the necessary remedial work to be performed in accordance with standard industry practices. Language was removed that required a work plan to meet KDHE’s provided scope of work. KDHE will continue to provide guidance for work plans, reports and general

scope of work requirements to assist the voluntary party and their consultant. The voluntary party and/or their consultant are provided more flexibility in developing the scope of work. KDHE addressed the objectives of the proposal and proposed remediation techniques to allow the objectives to be based on actual risk to human health and the environment for documented present and proposed future land use. The proposal must meet applicable state standards and guidelines or acceptable contaminant concentrations as determined by a risk analysis that evaluates the subject property and surrounding properties as a whole. These changes will allow for decisions that will be more site specific and based on the level of risk at a site.

KDHE added language to allow for verification sampling by the voluntary party, KDHE, or both. "Department" was removed and replaced by "secretary" where actions require discretion. Minor grammatical revisions were made to improve text. Duplicative language based on statutes was removed.

K.A.R. 28-71-10. No further action determination. This regulation establishes the conditions that must be met in order for a property to receive a "no further action" ("NFA") determination. To simplify the eligibility determination process, KDHE removed language and consolidated the contamination classifications for a subject property from four classifications to two. KDHE proposed three NFA determinations: NFA Class I, NFA Class II, and NFA Class II with conditions. New language was introduced to allow NFA considerations to be based on potential risk to impacted media at the subject property. This is further defined in K.A.R. 28-71-11 that provides the remedial standards and actions. "Department" was removed and replaced by "secretary" where actions require discretion.

The determination for a Class I NFA (contamination emanating from a source originating offsite) will remain the same. In addition, KDHE removed the requirement establishing a source property be enrolled in a state or federal program prior to granting a NFA to a subject property where contamination resulted from that source property.

A Class II NFA determination will include those properties where the release originated on the property and will include all media impacted such as soil, groundwater, air, etc. KDHE will determine whether contamination levels identified at the subject property present significant risk to human health and the environment by comparing them to the following: background levels, applicable state or federal cleanup levels, site-specific cleanup levels, acceptable concentrations determined by the department in a qualitative risk analysis that will evaluate the site and surrounding properties, or other risk analysis methods approved by the secretary.

A Class II NFA determination with conditions will include those properties where department-approved controls are necessary to restrict use of a property and to ensure continued protection of human health and the environment. These controls have been expanded to include institutional controls, environmental use controls, a risk management plan or combination thereof.

K.A.R. 28-71-11. Remedial standards and remedial actions. The following descriptive language for remedial actions considered by the department was removed: "cost effective," "including innovative technologies and natural processes," and "degradation of the natural source is maintained." Site-specific qualitative risk analysis or other risk analysis approved by the secretary as approaches to determine cleanup levels for a property were added. "Institutional controls" was removed and "approved controls" was substituted since additional programs such as the risk management program have been established as another option for site closure with

conditions. Soil and groundwater approaches to cleanup were removed. Groundwater cleanup levels will be based on actual and most probable use rather than most beneficial use considering present and future land use. The amendments to the regulation allow flexibility based on site-specific risk related to contamination at a property, especially when groundwater is determined to be nonpotable. "Department" was removed and replaced by "secretary" where actions require discretion. Minor grammatical revisions were made to improve text.

K.A.R. 28-71-12. Public notification and participation. This regulation addresses the requirements for public notification and participation. Duplicative language addressed in statute and self-regulating language were removed from the regulation

Fees

The total cost to the applicant is zero. KDHE proposed one increase in the initial deposit amount for Class I sites from \$1,000 to \$2,000. The increase will assist KDHE in meeting the needs of future voluntary parties by managing their redevelopment sites more efficiently without future delay due to lack of funds available to complete the project. The proposed deposit increase from \$1,000 to \$2,000 is consistent with the purpose of the program and remaining funds will be returned to the voluntary party following the NFA determination or mutual agreement on termination.

Environmental Benefit Statement

1) Need for proposed amendments and environmental benefit likely to accrue

a. Need

The proposed regulatory amendments provide a more clear and concise path to closure for voluntary cleanup sites that is less onerous to businesses, municipalities, and industry, but maintains protection of human health and the resources of the state.

b. Environmental benefit

The proposed regulatory amendments allow flexibility to industry, providing more options to meet closure requirements for those sites that do not pose an immediate threat to human health and the environment. By providing this flexibility to industry, KDHE anticipates fewer sites to be stalled in the program, which means more sites will pursue closure. This flexibility will not compromise the protection of public health and the environment.

2) When applicable, a summary of the research or data indicating the level of risk to the public health or the environment being removed or controlled by the proposed regulations or amendments.

The level of risk to the public health or the environment is evaluated for every property in the program. Sites impacting or likely impacting a potable water supply require maximum protection of the potable water source. Sites that are not impacting a potable water supply will be evaluated considering present and future land use and will allow risk-based cleanup levels.

3) If specific contaminants are to be controlled by the proposed regulation or amendment, a description indicating the level at which the contaminants are considered harmful according to current available research.

Not applicable.

Economic Impact Statement

1) Are the proposed regulations or amendments mandated by federal law as a requirement for participating in or implementing a federally subsidized or assisted program?

No.

2) Do the proposed regulations or amendments exceed the requirements of applicable federal law?

No.

3) Description of costs to agencies, to the general public and to persons who are affected by, or are subject to, the regulations:

a. Capital and annual costs of compliance with the proposed regulations or amendments and the persons who will bear those costs.

Costs to Agencies: No fiscal impact

Costs to Public: No fiscal impact

Costs to Voluntary Parties (Industry, business, private citizen): No net increase over the projected life of the project.

KDHE evaluated the fiscal impact to voluntary parties that enrolled Class I sites in the VCPRP from 2010 to 2016. The proposed increase to the voluntary party per Class I site is \$1,000. There were a total of twelve sites accepted in the VCPRP during that timeframe. The total costs incurred by KDHE for the twelve sites totaled \$24,367.80. An average cost of \$2,030 per site was incurred by KDHE and paid by the voluntary party to obtain the no further action determination for their site. KDHE proposed the increase in the deposit to allow for a smoother flow to completion without stopping because there are no funds to cover KDHE costs associated with the project. Although voluntary parties eligible to participate in the VCPRP may realize an increase in the initial deposit, the remaining deposit is returned to the voluntary party once they are mutually terminated from the program.

All of the regulation changes are expected to be a neutral or reduced cost as the changes provide flexibility in site assessment and remediation.

KDHE anticipates a decrease in capital and annual costs of compliance to the voluntary party because the proposed amendments will offer flexibility on the path to closure, eliminating the need for many low risk sites to languish in the program. There is no cost to the agency or the general public.

b. Initial and annual costs of implementing and enforcing the proposed regulations or amendments, including the estimated amount of paperwork, and the state agencies, other governmental agencies or other persons or entities who will bear the costs.

KDHE will revise guidance documents and material using existing staff and current budgets. There will be no increase in initial or annual costs to implement the proposed regulations or amendments. Labor costs will be absorbed within the program. Overall costs to the voluntary parties may be reduced as low risk sites are evaluated and potentially allowed closure based on risk.

Costs which would likely accrue if the proposed regulations or amendments are not adopted by the persons, who will bear the costs, and those who will be affected by the failure to adopt the regulations.

If the deposit increase amendment is not adopted, there will be no change to the VCPRP operations. KDHE will continue to stop work while the voluntary party provides additional funds to complete the work necessary to meet a no further action determination. The proposed change is a matter of convenience and time savings to the voluntary party and is expected to reduce KDHE administrative fees.

All proposed amendments benefit the voluntary party comprised of industry, commercial businesses, municipalities, pipeline companies, railroad companies and agricultural facilities, etc., while providing protection of health and the environment. If the amendments are not adopted, industry will be required to meet regulations that they feel are too restrictive and do not allow a clear path to closure for their properties. Failure to implement the proposed regulations could potentially result in reduced compliance.

d. A detailed statement of the data and methodology used in estimating the costs used in the statement.

Not Applicable.

e. Description of any less costly or less intrusive methods that were considered by the agency and why such methods were rejected in favor of the proposed regulations.

Not Applicable.

f. Consultation with League of Kansas Municipalities, Kansas Association of Counties, and Kansas Association of School Boards.

Copies of the draft regulations and regulatory impact statement will be forwarded electronically to the Kansas League of Municipalities, Kansas Association of Counties and Kansas Association of School Boards at the time of publication of the Notice of Hearing in the *Kansas Register*.